

1650 BROADWAY ASSOCIATES, INC.,  
Employer-Petitioner  
and  
v.  
STARDUST FAMILY UNITED,  
a/w INDUSTRIAL WORKERS OF THE  
WORLD Union  
Case No. 02-RM-184263

1. I am an attorney-at-law of the State of New Jersey and Member of the law firm of Day Pitney LLP, attorneys for Employer-Petitioner 1650 Broadway Associates, Inc. d/b/a Ellen's Stardust Diner ("Stardust" or the "Employer"). I submit this certification in support of the Employer's Motion for Reconsideration of the National Labor Relation Board's Order denying the Employer's Request for Review of the Regional Director's administrative dismissal of the Employer's RM petition.

97264488.1

3. Attached hereto as Exhibit B is a true and correct copy of the National Labor Relation Board's Order denying the Employer's Request for Review of the Regional Director's administrative dismissal of the Employer's petition dated May 17, 2017.

4. Attached hereto as Exhibit C is a true and correct copy of the letter sent via-email from Stardust Family United (the "Union") to Stardust dated August 26, 2016.

5. Attached hereto as Exhibit D is a true and correct copy of the Affidavit of Brent W. Yessin, Esq., dated September 15, 2016.

6. Attached hereto as Exhibit E is a true and correct copy of the letter sent via-email from the Union to Stardust dated September 14, 2016.

7. I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

  
\_\_\_\_\_  
PATRICK J. McCARTHY

Dated: May 26, 2017

# EXHIBIT A



UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD

REGION 02  
26 Federal Plz Ste 3614  
New York, NY 10278-3699

Agency Website: [www.nlrb.gov](http://www.nlrb.gov)  
Telephone: (212)264-0300  
Fax: (212)264-2450

November 22, 2016

Patrick McCarthy, Esq.  
Day Pitney LLP  
1 Jefferson Road  
Parsippany, NJ 07054

Re: 1650 Broadway Associates, Inc  
Case 02-RM-184263

Dear Mr. McCarthy:

The above-captioned case, petitioning for an investigation and determination of representative under Section 9(c) of the National Labor Relations Act, has been carefully investigated and considered.

**Decision to Dismiss:** As a result of the investigation, I find that further proceedings are unwarranted.

On September 14, 2016, the Employer, 1650 Broadway Associates, filed the instant petition to determine whether or not a majority of its employees supported the Union, Stardust Family United as their collective-bargaining representative. The evidence obtained during the investigation of the petition, however, fails to show that the Union's conduct constituted a present demand for recognition or that the Union was seeking recognition as the employees' representative. Therefore, the petition herein fails to raise a question concerning representation. Accordingly, I am dismissing the petition in this matter.

**Right to Request Review:** Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. The request for review must contain a complete statement of the facts and reasons on which it is based.

**Procedures for Filing Request for Review:** A request for review must be received by the Executive Secretary of the Board in Washington, DC, by close of business (**5 p.m. Eastern Time**) on December 6, 2016, unless filed electronically. If filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on December 5, 2016.

**Consistent with the Agency's E-Government initiative, parties are encouraged, but not required, to file a request for review electronically.** Section 102.114 of the Board's Rules do not permit a request for review to be filed by facsimile transmission. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the Efiling system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Upon good cause shown, the Board may grant special permission for a longer period within which to file a request for review. A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Very truly yours,



KAREN P. FERNBACH  
Regional Director

cc: Office of the Executive Secretary (by e-mail)

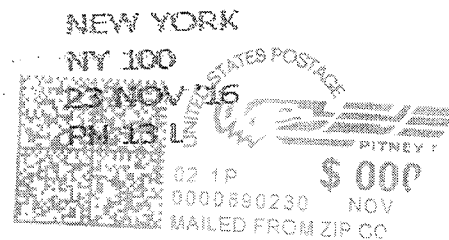
Ken Sturm, CEO  
1650 Broadway Associates, Inc.  
1650 Broadway Ste 1107  
New York, NY 10019-6833

Benjamin Dictor, Esq.  
Eisner & Dictor  
39 Broadway, Suite 1540  
New York, NY 10006

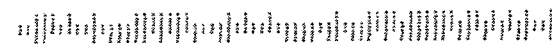
UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD  
REGION 2  
26 FEDERAL PLAZA - SUITE 3614  
NEW YORK, NY 10278-0104  
An Equal Opportunity Employer

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OFFICIAL BUSINESS

Day Pitney LLP  
1 Jefferson Road  
Parsippany, NJ 07054



07054-289199



# **EXHIBIT B**

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

1650 BROADWAY ASSOCIATES, INC.  
Employer-Petitioner

and

02-RM-184263

STARDUST FAMILY UNITED,  
a/w INDUSTRIAL WORKERS OF THE WORLD  
Union

ORDER

The Employer's Request for Review of the Regional Director's administrative dismissal of the petition is denied as it raises no substantial issues warranting review.<sup>1</sup>

MARK GASTON PEARCE, MEMBER

LAUREN McFERRAN, MEMBER

Dated, Washington, D.C., May 17, 2017.

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<sup>1</sup> We agree with the Regional Director that the Union did not demand recognition as a majority representative, and that her dismissal of the Employer's petition for an election on that ground was correct. Sec. 9(c)(1)(B) of the Act allows an employer to file a petition when a union has "presented . . . a claim to be recognized as the representative defined in Section 9(a)," i.e., as the exclusive collective bargaining representative, supported by a majority of employees in an appropriate unit. Although there is no particular wording necessary to find that the union has "presented" such a claim, the claim must clearly assert that the union has majority support at the present time. *New Otani Hotel & Garden*, 331 NLRB 1078, 1079 (2000). Accordingly "[t]he mere fact that the union is engaged in activities which it hopes will enable it *eventually* to obtain recognition by the employer is not evidence of a present demand for recognition. . . ." *Id.* (emphasis in original). The Board will not find that conduct "which falls short of an actual, present demand for recognition" as a Sec. 9(a) representative will support an employer's election petition. *Id.* Although the Union here, as our dissenting colleague emphasizes, expressed interest in meeting with management to "discuss our concerns with you," it did not purport to have the unit's majority support for doing so or request recognition as the majority representative. The Union's communications to the employer can therefore only be read as coming on behalf of those employees who supported the Union at that time.

Chairman Miscimarra, dissenting:

In this case, my colleagues deny the Employer's Request for Review of the Regional Director's administrative dismissal of the RM petition filed by the Employer, and agree with the Regional Director's findings. The Regional Director's dismissal noted that, "The evidence obtained during the investigation of the petition, however, fails to show that the Union's conduct constituted a present demand for recognition or that the Union was seeking recognition as the employees' representative. Therefore, the petition herein fails to raise a question concerning representation." Contrary to my colleagues, I believe the Union did make a present demand for recognition, and would, therefore, grant the Request for Review and reinstate the petition.

Section 8(d) of the Act lays out the obligation to bargain collectively. It states: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession."

In addition to several emails to the Employer on various dates in August and September 2016, the Union, on September 14, 2016, sent the following email to the Employer:

Ellen and Ken Sturm:

We would like to sit down and discuss our concerns with you. They are straightforward and are in the best interest of the restaurant: new equipment, adequate staffing, the immediate cessation of Unfair Labor Practices and the reinstatement of all employees unlawfully fired on and after August 24<sup>th</sup>.

We are interested in coming to a solution that is agreeable for both sides. We are confident that we can move forward in a positive direction that will benefit both the staff and the company. We are available for meetings this week.

Regards,

Stardust Family Union

In this email, the Union seeks both to meet and confer regarding mandatory subjects of bargaining (i.e., "new equipment" and "adequate staffing"), and to reach an agreement (i.e., "coming to a solution agreeable for both sides"). I believe these statements, in light of Section 8(d) of the Act, are more than sufficient to establish that the Union is, in fact, not only seeking to adjust grievances with the Employer, but also demanding recognition as the representative of the Ellen's Stardust Diner employees and, in that capacity, to negotiate an agreement with the Employer. As a result, I would grant the Employer's request for review and order the petition be reinstated.

PHILIP A. MISCIMARRA, CHAIRMAN

# EXHIBIT C

**From:** Stardust Family United <[joehill@stardustfamilyunited.com](mailto:joehill@stardustfamilyunited.com)>

**Subject:** Stardust Family United

**Date:** August 26, 2016 at 9:18:01 AM EDT

**To:** [joey@theribbonnyc.com](mailto:joey@theribbonnyc.com), [ken@theiridium.com](mailto:ken@theiridium.com), [ken@thesocialmerchant.com](mailto:ken@thesocialmerchant.com), [ksturm@globaldps.com](mailto:ksturm@globaldps.com), [mairead@thesocialmerchant.com](mailto:mairead@thesocialmerchant.com), [melissa@ellensstardustdiner.com](mailto:melissa@ellensstardustdiner.com), [Brigitte@ellensstardustdiner.com](mailto:Brigitte@ellensstardustdiner.com), [jason@theribbonnyc.com](mailto:jason@theribbonnyc.com), [lisa@theiridium.com](mailto:lisa@theiridium.com), [stardustdipu@yahoo.com](mailto:stardustdipu@yahoo.com), [tricialic@gmail.com](mailto:tricialic@gmail.com), [scottbarbarino@gmail.com](mailto:scottbarbarino@gmail.com), [quddus1725@yahoo.com](mailto:quddus1725@yahoo.com), [glen@sturnnyc.com](mailto:glen@sturnnyc.com)

Please see attached letter.

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We. are. Stardust (Family United).

To whom it may concern:

The employees of Ellen's Stardust Diner have organized to stand up for our rights and the conditions of our employment. Stardust Family United (SFU) represents the interests of all front and back of house staff.

SFU is a branch of the Industrial Workers of the World (IWW), the singing union. We are working to guarantee that all employees are safe, secure, fairly compensated and treated with the respect and dignity they deserve.

Our mission is to preserve the Stardust family legacy in order to ensure that future generations of Stardusters and customers alike can enjoy the same experience that gives Ellen's its reputation. In order to do this, we must restore the trust between all employees so that we can move forward as the team we once were.

Any terminations or disciplinary action of any kind will be considered retaliation for union activity. This is against the law, and we are prepared to take legal steps to protect our rights.

This is our right and our responsibility. We are Stardust (Family United).

Thank you for your time and consideration.

Stardust Family United

# EXHIBIT D

# AFFIDAVIT OF COUNSEL FOR THE EMPLOYER

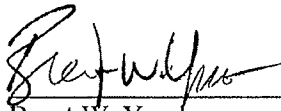
STATE OF NEW YORK     )  
                                      ) ss.:  
COUNTY OF NEW YORK )

The AFFIANT, being first duly sworn, does depose and attest as follows:

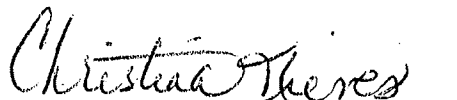
1. My name is Brent W. Yessin, and I am a resident of the State of Florida.
2. I am licensed to practice law in the States of Florida and Kentucky, and various Federal Courts nationwide, and have done so for more than 25 years.
3. I was retained by 1650 Broadway Associates, Inc. ("the Employer") to provide them advice and training in the National Labor Relations Act, a federal statute upon which I have provide counsel for more than 25 years.
4. I was on premises owned by the Employer on September 8<sup>th</sup> and 9<sup>th</sup> and professionals from my office and under my direction have been on site since August 29<sup>th</sup>.
5. During our time at the Employer we have witnessed "Recognitional Picketing" conducted by Industrial Workers of the World ("IWW") and their self-described affiliate "Stardust Family United" ("SFU") on at least two occasions.
6. During the picketing, the union had a banner with the IWW and SFU logos announcing "we are Stardust", as well as various posters and signs indicating bargaining objectives and handed out leaflets.
7. On August 30<sup>th</sup>, the SFU representatives by email requested a bargaining session with the Employer's CEO at 1 PM on September 2d to discuss a litany of working conditions that they had previously identified.
8. On September 9<sup>th</sup>, the undersigned had a discussion with several self-identified leaders of the SFU including Kenton Fridley, to confirm their demand to meet with the company management to negotiate terms and conditions of employment, and they claimed to represent the majority of the employees including, in their words "front and back of the house". They claim to have previously sent their bargaining proposals to the Employer.
9. I clarified with them that they meant by that "servers, bussers, runners, cooks and dishwashers, among others" and they responded in the affirmative. This includes all restaurant employees at Ellen's Stardust Diner.

10. On September 8<sup>th</sup>, the undersigned met with a small group of employees which included employees purporting to be leaders of SFU, including those associated publicly and quoted widely as the leadership of the union, including Kristine Bogan. Those employees, including Bogan, claimed to represent a majority of employees including "front and back of house" and said they had asked to meet with company management to negotiate on their terms and conditions of employment.
11. The IWW has identified the SFU as its affiliate representing workers at Ellen's Stardust Diner.
12. The attached petition was received by the employer, and represents 83 employees who claim they do not wish to be represented by the IWW.
13. Based on the claims of majority status by the union, the recognitional picketing that has taken place involving more than 10% of employees, the representation in the attached open source documents in which the SFU claims to represent the majority of workers, "front and back of the house", the emails requesting bargaining dates and recognition based on the presumed majority status, and the conflicting evidence presented by more than 35% of the workforce to the effect that they do not support the union, the employer has both been presented with a demand for recognition and has a good faith reasonable uncertainty as the union's majority status.

FURTHER AFFIANT SAYETH NAUGHT.

  
Brent W. Yessin

Sworn to and subscribed before me this the 13<sup>th</sup> day of September, 2016, by Brent W. Yessin, Esq., who is personally known to me, and who did take an oath.

  
Notary Public

**CHRISTINA E. NIEVES**  
Notary Public, State of New York  
No. 01Ni8337586  
Qualified in Bronx County  
Commission Expires 02/29/2020

# EXHIBIT E

**From:** Stardust Family United <[joehill@stardustfamilyunited.com](mailto:joehill@stardustfamilyunited.com)>  
**Subject:** To Ellen and Ken Sturm  
**Date:** September 14, 2016 at 2:40:58 PM EDT  
**To:** Ken Sturm <[ken@theiridium.com](mailto:ken@theiridium.com)>

Please see attached letter.

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We. are. Stardust (Family United).

Ellen and Ken Sturm:

We would like to sit down and discuss our concerns with you. They are straightforward and are in the best interest of the restaurant: new equipment, adequate staffing, the immediate cessation of Unfair Labor Practices and the reinstatement of all employees unlawfully fired on and after August 24<sup>th</sup>.

We are interested in coming to a solution that is agreeable for both sides. We are confident that we can move forward in a positive direction that will benefit both the staff and the company. We are available for meetings this week.

Regards,

Stardust Family United